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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 668

AMPLEX OF MARYLAND, INC.,
Petitioner,

v.

OUTBOARD MARINE CORPORATION,
Respondent.

PETITION FOR REHEARING ON SUPREME COURT'S DENIAL OF WRIT OF CERTIORARI

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Petitioner respectfully requests that the Court grant rehearing of its order dated January 15, 1968, which denied certiorari, and that the Court now either grant certiorari or reserve ruling on the petition for certiorari until the Antitrust Division of the Department of Justice has had an opportunity to initiate and complete an investigation or other proceeding to determine whether the defendant Outboard Marine Corporation has and is in fact engaging in unlawful exclusive dealing and monopolization of the outboard motor industry as alleged here by plaintiff Amplex.

Subsequent to the Court's order of January 15, 1968, plaintiff Amplex has filed with the Antitrust Division of the Department of Justice a request for an investigation

and prosecution of defendant Outboard Marine Corporation for its exclusive dealing practices, together with a copy of the transcript of testimony received and proffered in the instant proceeding, the substance of this complaint to the Division being that the defendant has in fact used the device of exclusive dealing to create and maintain a monopoly and that the public interest requires (a) an injunction against further such unlawful exclusive dealing, and (b) divestiture and dissolution of defendant Outboard Marine Corporation into two or three separate, competing firms. (Defendant's two princ ' divisions, "Johnson" and "Evinrude," were originally separate, competing entities, the competition between them having been eliminated by merger in 1936, while a prior consolidation in 1929 had united Evinrude and two other firms, Elto Outboard Motor Company and Lockwood Motor Company. *Mood's Industrial Manual* 29 (June 1967)).

If such a proceeding is in fact undertaken (as plaintiff has reason to believe it will be, for the reasons indicated below), and if that proceeding should result in a judicial finding that defendant Outboard Marine Corporation has in fact been engaging in unlawful exclusive dealing and monopolization of the outboard motor industry on a national scale as plaintiff alleges, then the instant order of January 15, 1968, denying certiorari in the present case, will have necessarily worked a serious miscarriage of justice: plaintiff Amplex, though then judicially recognized as the victim of an antitrust violation, will at that point have been irrevocably barred from all possible avenues of redress, particularly the statutory right to bring suit on the basis of evidence discovered by the government's superior investigative techniques and resources, the right to avail itself of any judgment obtained by the government as a presumptive aid in proving the fact of violation in its subsequent private action, and the right to benefit from the tolling of the statute of limitations during the pendency of the government action.

Plaintiff believes the Department of Justice, Antitrust Division, will in fact conduct the requested investigation and prosecution for the following reasons:

(1) The Assistant Attorney General in charge of the Antitrust Division, Dr. Donald F. Turner, has as already noted reviewed the evidence introduced and proffered in the instant proceeding and, on the basis of that review, has joined the Solicitor General in representing to the Court here, in the *amicus* brief of the United States, that:

a. *This evidence alone* is sufficient to support a finding that defendant Outboard Marine Corporation is in fact actively engaging in the kind of competition – injurious exclusive dealing – which the Federal Trade Commission had previously found defendant practicing and ordered it to stop in 1956. As the Solicitor and Dr. Turner have expressed it to the Court here: "Petitioner's proof and offer of proof in the present case would justify similar conclusions to those made by the Federal Trade Commission (in 1956)." Memorandum for the United States as Amicus Curiae in Support of the Petition for a Writ of Certiorari p. 8, n. 13 (November 1967).

b. A substantial *public* interest is injured by this defendant's successful policy of exclusive dealing in this industry and the failure of the lower courts here to deal appropriately with it. ". . . we think that the record shows that the respondent's exclusive dealing produced a sufficiently serious foreclosure of outlets to respondent's competitors to establish the requisite anticompetitive effect under either Section 1 of the Sherman Act or Section 3 of the Clayton Act." *Id.*, p. 7.

As operating head of the United States' principal antitrust arm, the Antitrust Division of the Department of Justice, Dr. Turner has, as we understand it, the necessary authority to initiate investigations of possible antitrust violations, including investigations of the kind requested by the plaintiff here. Having already physically seen sufficient evidence to support, in his view, a judicial finding of unlawful exclu-

sive dealing on the part of this defendant, and having publicly expressed his conviction that the public interest involved in remedying that violation is sufficiently great to merit the attention of this Court, it must be assumed, and the plaintiff does assume, that Dr. Turner will now use every resource at his command to bring the defendant's practices into line with the rule of law urged on the court in the *amicus* brief, of the United States here, namely, the rule that a refusal to deal is actionable under Section 4 of the Clayton Act "when it is used to secure, or in an attempt to secure, agreement to a proposal which, if acceded to, would (1) comprise one of a set of contracts in unreasonable restraint of trade, or (2) constitute one of a number of sales agreements made on condition or understanding of exclusive dealing." *Id.*, p. 12.

No substantial "right" of the defendant would be prejudiced by the granting of plaintiff's request for rehearing and by reserving ruling on the petition for certiorari at the present time. On the other hand, a final denial of certiorari will not only deny this plaintiff any hope of redress after completion of the anticipated government prosecution but will, in addition, leave standing an unfortuate precedent to burden the government's efforts in the lower courts. By reserving ruling now, the Court can not only avoid those two undesirable results but secure an added, affirmative public benefit as well: when the Court later passes on the important public policy questions presented here by the practices of this defendant, that judgment will then be enlightened by a full adjudicative record in the government's case, a record shaped by the litigants and the lower courts in the full knowledge of its ultimate review by this Court and one thus expressly designed to show the Court "the economic and business stuff" involved to a far greater extent than any private plaintiff's limited resources would be likely to permit. Finally, the plaintiff respectfully urges that the reservation of the Court's ruling on the petition for certiorari now would have a profound effect on the incentives of private plaintiffs such as itself to continue serving "the important public purpose of supplementing the government's enforcement activities, and

thus play a major role in obtaining compliance with those laws." *Id.*, p. 4.

It would seem to be particularly consistent with the maintenance of those incentives to preserve for a plaintiff that has exhausted its resources in developing the facts of an antitrust case of significant public importance, and in presenting those facts to the appropriate public officials, an opportunity to ultimately obtain redress for its own private injuries after having helped to secure that larger public interest.

The petition for certiorari presented questions based upon the proffer of evidence and actual uncontradicted evidence relating to other similar refusals to deal as well as to pressures exerted by the Defendant through its district representatives on dealers to stop selling competing products. Evidence of this type was evidently rejected by the district court in its oral opinion given immediately upon the close of argument as well as the Court of Appeals even though the court stated to the Plaintiff, at page 84 of Defendant's Appendix "to *require* you to make a specific proffer."

The Court delivered an oral, off the cuff opinion and recited only those facts which supported *its* conclusion of law not mentioning other uncontradicted facts critical to a different legal conclusion. There was no attempt to make findings of fact as such. This Court has evidently concurred that the District Court judge became the "unfettered trier of fact" due to the non-jury nature of the proceeding in spite of the summary techniques utilized and has accepted its opinion as findings of fact. For the purposes of this Petition for Rehearing, the Petitioner is bound by that decision. However, there is uncontradicted evidence not mentioned in the opinion which gives rise to violations of the Sherman Act not presented in the Petition for Certiorari. The acts complained of in the instant case, assuming the acceptance of the proffered and uncontradicted evidence (which Petitioner and the Justice Department did in their Petitions) in the opinion of counsel, fell so far within the guidelines established by this court in dealing with anti-

trust violations, that virtually Petitioner's entire petition for certiorari was devoted to the economic effects of the violation rather than specific legal argument on the nature of the violation. Neither Petitioner nor the Department of Justice in its Amicus brief anticipated this procedural difficulty.

Since the Petitioner believes sufficient public interest in the issues presented has been shown in its petition for certiorari, it can only conclude that this Court's denial of certiorari is based either upon an acceptance of the Respondent's argument that nothing more was proven than a single refusal to deal by a firm admittedly possessing 60% of its national market or that the refusal to deal in and of itself, establishes a lack of agreement or combination sufficient for a Sherman Act, Section 1 or Clayton Act violation.

The petitioner in its petition to this Court chose to emphasize evidence it believed was erroneously rejected by the District Court[1] which, once accepted by this Court, would unquestionably establish a violation of the antitrust laws and be the basis for this Court's granting of certiorari.

There is however, other uncontradicted evidence supporting a violation of Section 2 of the Sherman Act, specifically, the attempt to monopolize provisions. To establish this violation requires proof of specific intent to monopolize and possibly proof relating to a dangerous possibility of success.

The District Court in its opinion, at Plaintiff's appendix page 20 stated:

> ". . . I am inclined to the view that giving the Plaintiff all of the benefits and favorable inferences which I think it is entitled at this stage of the proceedings, . . . there was sufficient evidence to require a defense on the item of specific intent. . ."

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[1] Paul Wright's testimony relating to similar acts and the proffered testimony incriminating other district representatives and officials of Outboard of similar anti-competitive actions.

It was only the District Court's inability to appreciate the significance of the Defendant's 60% market share that caused it subsequently to make statements casting doubt upon the proof relating to specific intent. However, aside from the District Court's statement and aside from the entire proffer of evidence and aside from Paul Wright's testimony relating to threats and pressures on dealers who desired to sell competing products, in determining whether this defendant had an intent to monopolize its acts must be measured by the principals established by this Court in the *Times Picayne v. U.S.* case, 345 U.S. 594 (1953) e.g. whether or not the conduct complained of is explainable as normal legitimate business conduct. Other criteria for gauging the intent of a manufacturer in refusing to deal relate to the reasonableness of the act and whether there is any social or economic justification for the action. The act, insofar as Outboard Marine Corporation is concerned, of necessity is unreasonable unless there was an intent to achieve something more than the mere ouster of a single dealer. No manufacturer would refuse to deal with the customer that is giving him 40% more business than any other of his dealers in a three state area, as was Amplex. No social or economic justification for the refusal to deal has been shown. One fact that cannot be denied the Petitioner before this Court is the refusal to deal by Outboard was motivated solely by Outboard's desire that Amplex sell its engines exclusively. Further, the Petitioner cannot be denied the established fact that a refusal to deal for this reason was in direct violation of the Defendant's own written policy, Dx. No. 9, Plaintiff's Appendix 142, which specifically prohibited refusals to deal for this reason. The act just cannot be explained as normal legitimate business conduct since it violates the Defendant's own alleged operating procedure. If not normal and legitimate, the only other purpose must relate to an intent to further increase or maintain its already 60% share of the market by the exclusion of Mercury from Amplex. There is no other explanation for the refusal to deal. Since the refusal to deal is not ex-

plainable as normal, legitimate business conduct and lacks all social or economic justification, the specific intents requirement is satisfied.

With reference to the argument presented by Outboard relative to the requirement that there must be proven an intent to do more than the specific act, though the Petitioner believes it has convincingly satisfied that standard through its proffer of testimony, directs the Court's attention to the *Swift and Company v. United States* case, 196 U.S. 375 where it was stated that when the overt act is set within a framework of ability to consummate a substantive offense, either by the forces of nature or the perpetration of some further act, the conduct or element of an attempt to monopolize is satisfied. The ability of Outboard to consummate an offense is self-evident in this record from the evidence relating to its market percentage, product differentiation, percentage of outlets controlled, dealer dependence upon the defendant, weakness of its competition and the defendant's system of inspecting its dealer's establishment. Even if this defendant did not in fact have monopoly power, which is most difficult to accept, in an attempt to monopolize situation, all that need be shown is the near occurrence of monopoly power. With an existing 60% of the market it cannot be said that this defendant is not near, if it does not in fact possess, monopoly power.

If Outboard does have monopoly power or is likely to acquire such power, then it is guilty of monopolization under Section 1 if it undertakes or attempts to undertake an act which tends to strengthen its market position.

Paraphrasing the *U.S. v. Swift and Company*, supra, dangerous possibility test, if the defendant's acts in the instant case are insufficient in and of themselves to constitute monopolizing, by virtue of its market position, it has the power to accomplish the required further acts to bring this result to pass and therefore, an intent to bring it to pass produces a dangerous probability that it will happen and the offense of attempting to monopolize is completed.

Further, Justice Cardozo, speaking for the Court in the *U.S. v. Swift and Company* case, supra, stated:

> "Size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past."

This defendant was ordered by the Federal Trade Commission to cease and desist by the Federal Trade Commission in 1956 the very activities of which the petitioner now complains.

The petitioner firmly believes it has proven the requisite intent on the part of Outboard not only by virtue of the testimony relating to similar happenings as testified to by Paul Wright and as stated in the proffered testimony, but this intent is firmly established by the defendant's exhibit No. 47, Appellant's Appendix page 148 where Mr. Schiavina refers to Mr. Nat Gates's agreement to stop selling the Mercury engine about one year from the date he acquired his Johnson franchise and the subsequent honoring of that agreement, when, 16 months later, Mr. Gates no longer sold Mercury engines but dealt in Johnson exclusively.

Lessig v. Tidewater, 327 F.2d 451 (1964) specifically held that dangerous probability of success is not a necessary element of proof in an attempt to monopolize case on the basis that the actor is in the best position to determine the likelihood of success of his action. The District Court in the instant case stated that it was attracted to the doctrine of *Lessig* (see Petitioner's Appendix pg. 16) but that it was bound by the contrary law of the Fourth Circuit as set forth in the case of *McElhenney and Company v. Western Auto Supply Company*, 167 F. Supp. 949 (1959). The conflicting requirements between the 9th and 4th Circuit necessary to establish an attempt to monopolize is thus directly presented.

In any event, the necessary elements to establish a dangerous possibility of success if Outboard has a specific intent to monopolize is established in this record. It just cannot be said that a firm controlling 60% of a national market with

the balance of the competition divided amongst the 11 other competitors (about 4% per competitor) and controlling up to 72% of all outlets of distribution does not satisfy the dangerous possibility of success requirement necessary to complete the violation of an attempt to monopolize.

There is also a violation of Section 1 of the Sherman Act based upon a standard not previously presented to this Court. The evidence undeniably established that Paul Wright, the district representative of the defendant in 1960, told the plaintiff that it must phase out the competing Scott engine it was then selling. Both Paul Wright and Nicholas Canzona, plaintiff's president, so testified without contradiction. The petition did in fact substantially reduce its purchases of Scott engines. It was the attempt by the defendant to expand the agreement made by Paul Wright and the Petitioner, that resulted in the refusal to deal.

As Mr. E. Compton Timberlake stated in his recent antitrust work, *Federal Treble Damage Antitrust Suits* (1965) at pages 181-182.

> "There can be no doubt that an independent refusal to deal may be unlawful;[2] however, this right is not without some qualification. Where the refusal to deal is an exercise of monopoly power OR where the refusal to deal is because the buyer will not join with the seller in a contract OR COURSE OF CONDUCT violative of the antitrust laws, such refusal to deal may be held to violate Section 1 or 2 of the Act."[3] (emphasis supplied)

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[2] *House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F.2d 867 (2d Cir. 1962) and cases listed in *Albert H. Cayne Equipment Corp. v. Union Asbestos and Rubber Co.*, 220 F. Supp. 784, 786 (S.D.N.Y. 1963); accord: *Best Advertising Corp. v. Illinois Bell Tel. Co.*, 229 F. Supp. 275 (S.D. Ill., 1964).

[3] *U.S. v. Parke-Davis & Co.*, 362 U.S. 29 (1960). See A Simple Refusal To Deal, 71 Yale L. J. 1565 (1962); Customer Selection or Dealer Protection 22ABA AntiTrust Section 49; Doric Simplicity or Dirty Pool, 29 U. Det. L. J. 414 (1962).

It was Amplex's refusal to agree with the Defendant on a course of conduct which, if done, would most certainly have satisfied the requirement of "agreement" requisite to a Section 1 or Clayton Act violation that prompted the refusal to deal. Amplex is being denied legal redress for having refused to participate in an illegal course of conduct.

CONCLUSION

For the reasons set forth in this Petition for Rehearing as well as in the Petition for Certiorari previously filed, rehearing should now be granted and either certiorari granted or ruling reserved until the Antitrust Division of the Department of Justice has determined what proceedings, if any, the public interest requires against this defendant and, if any such proceeding is undertaken, until it shall have been completed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Pursuant to Rule 58, we hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in paragraph 2 of Rule 58.

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